

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HORATIO FORREST,

Petitioner,

v.

THOMAS MCGUINNESS,

Respondent.

ORDER
21-CV-05853 (HG)

HECTOR GONZALEZ, United States District Judge:

On October 18, 2021, Petitioner Horatio Forrest, currently in the custody of the New York Department of Corrections and Community Supervision, petitioned this Court *pro se* for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. ECF No. 1 (Petition). Following a jury trial in Kings County Supreme Court, Petitioner was convicted of two counts of Robbery in the First Degree, three counts of Robbery in the Second Degree, and Criminal Possession of a Firearm in the Third Degree. ECF No. 5-17 (July 6, 2015, Trial Transcript) at 1158-59; ECF No. 5-18 (November 25, 2015, Sentencing Transcript) at 39-41. Defendant was sentenced to prison terms totaling twenty years, followed by five years of post-release supervision. ECF No. 5-18 (November 25, 2015, Sentencing Transcript) at 39-41. Petitioner's conviction was affirmed on appeal to the New York Supreme Court, Appellate Division. ECF No. 5-22 (February 5, 2020, Second Department Decision). Petitioner's request for leave to appeal to the New York Court of Appeals was denied. ECF No. 5-25 (November 17, 2020, Court of Appeals Decision).

Petitioner challenges the constitutionality of his trial, arguing that he was denied a fair trial because of alleged improprieties having to do with the admission of identification evidence at trial, the determination that he was competent to stand trial, and various alleged erroneous

evidentiary rulings. ECF No. 1 at 4. Petitioner also asserts that he received ineffective assistance of counsel. *Id.*

On March 14, 2022, Petitioner moved this Court to hold his petition in abeyance so that he could exhaust his ineffective assistance of counsel claim in state court by filing a § 440.10 motion under New York Criminal Procedure Law. ECF No. 9 (Motion to Stay). The Court granted the motion and stayed the action. *See* April 18, 2022, Order. At the direction of the Court, Petitioner has continued to provide updates on the status of his § 440.10 motion. ECF Nos. 11, 12, 13, 14 (Status Reports). In his latest status report, Petitioner represented that his § 440.10 motion was denied at the trial level and the Appellate Division denied leave to appeal that decision. ECF No. 14; *People v. Forrest*, No. 70008/2013 (N.Y. App. Div. Oct. 6, 2023).

In light of these developments, the Court deems Petitioner's § 440.10 motion as exhausted and lifts the stay. Under New York law, an ineffective assistance of counsel claim raised under § 440.10 is exhausted once petitioner raises it as part of a motion to vacate the judgment at the trial level and then seeks leave to appeal the claim at the Appellate Division. *Anthoulis v. New York*, No. 11-cv-1908, 2012 WL 194978, at *3 (E.D.N.Y. Jan. 23, 2012) (citing cases); *Desrosiers v. Phillips*, No. 05-cv-2941, 2006 WL 2092481, at *9 (E.D.N.Y. July 27, 2006) (citing cases). Although Petitioner claims that he is in the process of moving for the Appellate Division to reconsider its decision denying leave to appeal, "Petitioner has exhausted his claim at the state level, since the Appellate Division denied him leave to appeal regarding the 440.10 motion." *Desrosiers*, 2006 WL 2092481, at *9 (citing *People v. Williams*, 342 N.Y.S.2d 75, 76 (N.Y. App. Div. 1973) ("No appeal lies from an order denying a motion for leave to appeal to [the Appellate Division].")). Because Petitioner cannot appeal his 440.10 motion any further, this Court lifts the stay, and the case shall proceed.

Respondent is directed to provide supplemental briefing regarding the issues raised in Petitioner's § 440.10 motion by December 6, 2023. Respondent shall additionally supplement the record with any filings and decisions from the § 440.10 proceeding. Petitioner may file a response to Respondent's supplemental briefing by January 5, 2024. The Clerk of Court is respectfully directed to mail a copy of this order to *pro se* Petitioner.

SO ORDERED.

/s/ Hector Gonzalez
HECTOR GONZALEZ
United States District Judge

Dated: Brooklyn, New York
November 6, 2023